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No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

IN RE MOSES N. ASLAN,
Debtor.

THE HONGKONG AND SHANGHAI BANKING CORPORATION AND CENTRAL BANK,
Petitioners,

v.

MOSES N. ASLAN,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. If a bankruptcy claim, based on a final state court judgment and allowed by the Bankruptcy Court, is partially disallowed on appeal, does due process of law require an evidentiary hearing before the judgment creditor is required to perform an agreement giving the debtor a credit against the judgment, where (a) the credit had been conditioned on full performance and payment of the judgment, and (b) the Bankruptcy Court never held such a hearing?

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption and were the only parties before the Ninth Circuit Court of Appeals.

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CROSS-PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners The Hongkong and Shanghai Banking Corporation ("Hongkong Bank") and Central Bank (sometimes collectively "the Banks") respectfully pray that if a writ of certiorari is issued on the Petition of Moses N. Aslan ("Aslan"), a writ of certiorari then issue on this Cross-Petition to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on the Banks' cross-appeal on May 29, 1992.

OPINION BELOW

The Memorandum Opinion of the Ninth Circuit Court of Appeals filed May 29, 1992 (the "Opinion") was unpublished, and a copy is attached to Aslan's Petition as Appendix B. The Court of Appeals denied Aslan's Petition for Rehearing and Suggestion For Rehearing en banc by order filed July 28, 1992, a copy of which is attached to Aslan's Petition as Appendix A.

The Opinion, on rehearing, modified the earlier memorandum opinion of the Ninth Circuit Court of Appeals filed March 25, 1991, a copy of which is attached to Aslan's Petition as Appendix C. Thus, the Opinion affirms the order of the United States District Court for the Central District of California, a copy of which is attached to Aslan's Petition as Appendix D, affirming without opinion the decision of the United States Bankruptcy Court for the Central District of California entered January 5, 1988. The Bankruptcy Court's Findings of Fact and Conclusions of Law, and its Order, are attached to Aslan's Petition as Appendices E and F respectively.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review the Opinion. The date of entry of the Opinion is May 29, 1992. The Banks expressly rely upon Rule 12.3 of the Rules of this Court; the Petition for Writ of Certiorari in response to which this Cross-Petition is filed was received on October 27, 1992.

CONSTITUTIONAL PROVISION INVOLVED

A. United States Constitution, Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

The facts underlying the Banks[1] claims are set forth in detail in the Banks' Brief in Opposition to the Petition for Writ of Certiorari, filed concurrently herewith. Those facts will be presented herein in summary form only, together with a full exposition of the facts upon which this Cross-Petition is based.

The Banks sued Aslan after learning that he had stolen about $3.2 million from them through a "check kite." The Banks sought recovery of the proceeds from the check kite plus interest thereon, other damages, and imposition of a constructive trust on Aslan's real properties by virtue of his investment of the stolen funds in those properties.

In addition to the check kite, Aslan had defaulted on a loan from Hongkong Bank, secured by a deed of trust on the Rowan Building. On the eve of Hongkong Bank's foreclosure on the Rowan Building, Aslan agreed to the stipulated Judgment which is the subject of his Petition. The Judgment, entered after a full hearing, awarded the Banks damages of $8,373,298.56, together with an interest in Aslan's real properties; the Judgment could be reduced, and Aslan could retain his properties, if he made four timely payments totaling $6,373,298.56.

Meanwhile, no agreement was reached concerning the foreclosure sale of the Rowan Building, and the sale ultimately was

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[1]Pursuant to Supreme Court Rule 29.1: Hongkong Bank is a wholly owned subsidiary of HSBC Holdings plc. Hongkong Bank's subsidiaries (other than wholly owned subsidiaries) are Aspiration Land Investment Ltd.; Banking Computer Services Pte. Ltd.; Collyer Quay Properties Ltd.; Electronic Payment Services Co. (HK) Ltd.; Eltis Precision Printing Ltd.; Hang Seng Bank Ltd.; The Hong Kong Futures Guarantee Corporation, Ltd.; Hongkong and Shanghai Thomas Cook Ltd.; The International Investment Company of Chile S.A.; Isoba Ltd.; Ocean Properties Pte. Ltd.; Ocean Towers Pte. Ltd.; Ortigas and Company Limited Partnership; Plimmer City Centre Ltd.; Tindalk Ltd.; Vinebel Realties Ltd.; and Xinjiang World Plaza Hotel Ltd. Central Bank, now known as Bank of the West, is a wholly owned subsidiary of Banque Nationale de Paris. Bank of the West has no non-wholly-owned subsidiaries.

conducted. Hongkong Bank bought the Rowan Building at the foreclosure sale, and subsequently resold it at a net profit of $3,137,209.58.

Hongkong Bank thereafter entered into the August 1, 1985 Letter Agreement with Aslan, whereby the Bank agreed to credit that net profit against the Judgment, on the express condition, among others, that Aslan affirm, ratify, and perform all his obligations under the Judgment, including timely payment of all the sums required. [Appellant's District Court Excerpts of Record at 38, 41, 225-226.] Aslan's then-counsel, Charles T. Rose ("Rose"), explained to his client that if Aslan failed to perform all the terms and conditions of the Judgment, or attacked the Judgment, Aslan would forfeit any right to the credit from the resale of the Rowan Building. Rose told Aslan that the Rowan Building profit belonged to Hongkong Bank and was a "pure gift" to Aslan. [Respondents' (Banks') District Court Excerpts of Record at 749-750.] All Aslan had to do was abide by the stipulated Judgment, and not attack it.

Contrary to his obligations, Aslan did attack the Judgment. He sought a reduction of the Banks' claim under the Judgment on the stated ground that the $2,000,000 early payment discount afforded him under the Judgment was, in fact, an unenforceable penalty. The Bankruptcy Court ruled against him on his "penalty" argument, finding only not only that the Judgment did not contain any unenforceable penalty but also that under principles of *res judicata* the Court would not reopen, modify or reexamine the Judgment. [Aslan's Petition ("Pet."), Appendix ("App.") at E-6.] Thus, the Bankruptcy Court permitted the Banks to recover the entire Judgment amount by virtue of their proof of claim in Aslan's bankruptcy case. However, inasmuch as the Banks were receiving the benefit of their bargain under the Letter Agreement, i.e., the entire Judgment amount, the Bankruptcy Court also ruled that Aslan was entitled to the credit of the Rowan Building profit. [*Id.*] Because the Bankruptcy Court invoked *res judicata*, the Court never held any evidentiary hearing concerning Aslan's contention that the Judgment included a penalty; nor was any evidentiary hearing held on the question of whether *if* Aslan's attack on the Judgment had succeeded, then consideration would

have failed for the Rowan Building credit and Aslan would not have been entitled to retain it.

Aslan appealed from the Bankruptcy Court's refusal to find the $2,000,000 discount to be a "penalty", and the Banks cross-appealed from the determination that Aslan was still entitled to the Rowan Building credit. The District Court affirmed without opinion. The Ninth Circuit Court of Appeals initially reversed the "penalty" determination but, upon rehearing, likewise affirmed the lower court's rulings. In its May 29, 1992 Opinion, the Court of Appeals held that *res judicata* does apply in bankruptcy proceedings, and that none of the exceptions to its applicability was present. The Court also held, among other things, with respect to the Rowan Building credit, that inasmuch as the Banks had been paid the full amount of the Judgment, including interest, therefore the contention that Aslan had breached the Letter Agreement by failing to perform was without merit. [Pet., App. at B-7.]

ARGUMENT: IF ASLAN'S PETITION IS GRANTED, AND THE JUDGMENT IN FAVOR OF THE BANKS IS REDUCED, THEN DUE PROCESS REQUIRES THAT THE BANKS BE AFFORDED A HEARING ON ASLAN'S RIGHT TO RETAIN THE ROWAN BUILDING CREDIT

A. Summary of Argument.

The Banks accept the Ninth Circuit's Opinion, and contend that Aslan has utterly failed to establish any basis for granting his Petition for a Writ of Certiorari. The Banks urge denial of Aslan's Petition.

However, in the event that this Court does grant Aslan's Petition, and subsequently either finds for Aslan on the merits of his "penalty" argument or remands that question to the Bankruptcy Court for a factual determination, then due process of law requires that the entire case be remanded to the Bankruptcy Court, for an evidentiary hearing on the rights of the parties with

regard to the Rowan Building profits.[2] To reduce the Banks' Judgment, without affording them an evidentiary hearing on whether such reduction vitiates Aslan's right to the Rowan Building resale profit, would depart from the accepted course of judicial proceedings. [S.Ct.R. 10.1(a).]

B. The Banks Cannot Be Deprived Of The Rowan Building Profits Without Due Process Of Law.

This Court "consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). "The central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard at a meaningful time and in a meaningful manner." *Orloff v. Cleland*, 708 F.2d 372, 379 (9th Cir. 1983).

Due process is a flexible concept which requires, at a minimum, a meaningful opportunity to be heard. *Little v. Streater*, 452 U.S. 1, 5-6, 101 S.Ct. 2202, 68 L.Ed. 627 (1981).

No evidentiary hearing has been held regarding the intent of the parties in entering into the Judgment and the Letter Agreement, or the surrounding circumstances. No such hearing has been necessary, because the lower courts' rulings have properly invoked *res judicata* in precluding Aslan from collaterally attacking the final and valid state court Judgment.

However, as the Banks have argued in their accompanying Brief in Opposition to Aslan's Petition, if the Court otherwise finds any merit in Aslan's argument, the penalty question should be remanded for an evidentiary hearing. Whether a contract

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[2] It appears that if this Court does wish to review Aslan's "penalty" argument, the Court *sua sponte* may also review the Banks' claims regarding the Rowan Building profit. *Langnes v. Green*, 282 U.S. 531, 538, 51 S.Ct. 243, 75 L.Ed. 520 (1931). However, there is also authority for the proposition that absent a cross-petition for certiorari, the Banks' contentions would not be open to review. *See Brennan v. Arnheim and Neely, Inc.*, 410 U.S. 512, 516, 93 S.Ct. 1138, 35 L.Ed.2d 463, *reh. denied*, 411 U.S. 940, 93 S.Ct. 1888, 36 L.Ed.2d 402 (1973). This Cross-Petition is filed in light of these authorities, as a matter of caution.

contains a penalty is a question of fact. *Los Angeles City School District v. Landier Investment Co.*, 177 Cal.App.2d 744, 753, 1 Cal.Rptr. 662 (1960). When a factual issue has not been previously litigated in the trial court, the appellate court should remand the matter rather than deciding the issue upon an inadequate record. *Mouser v. United Security Life*, 267 F.2d 3, 4 (9th Cir. 1959).

Likewise, if Aslan prevails on his "penalty" argument, the question of his entitlement to the Rowan Building profits is necessarily affected, for two reasons. First, as the Banks have explained herein, the Bankruptcy Court did not need to, and therefore did not, conduct any evidentiary hearing with regard to the circumstances of the Letter Agreement. Second, it would be inequitable to permit Aslan to recover $2,000,000 on his attack upon the Judgment, yet at the same time to permit him a $3.1 million windfall — a "pure gift," in his counsel's words — the consideration for which was supposed to be his forbearance from making that very attack. *I.e.*, if Aslan is permitted to successfully attack the Judgment, contrary to his obligations under the Letter Agreement, then a hearing must be held on whether his attack on the Judgment is a breach of the Letter Agreement, or a failure of consideration thereunder which precludes Aslan from retaining the Rowan Building credit. It is possible that under such circumstances, the Bankruptcy Court would not give the credit to Aslan. "[A] court must avoid an interpretation which will make a contract extraordinary, harsh, unjust or inequitable." *Strong v. Theis*, 187 Cal.App.3d 913, 920, 232 Cal.Rptr. 272 (1986).

On remand, the Bankruptcy Court would be justified, also, in finding that under the Letter Agreement, Aslan was not permitted to simply recite that he affirmed and ratified the Judgment, but then to breach that promise, attack the Judgment, and still benefit from the Letter Agreement's terms. "[I]n every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Northridge Hospital Foundation v. Pic 'N' Save No. 9*, 187 Cal.App.3d 1088, 1100, 232 Cal.Rptr. 329 (1986). Similarly, the Bankruptcy Court could find that a successful attack by Aslan on the final $2,000,000 portion

of the Judgment excuses Hongkong Bank from any obligation to permit Aslan to retain the Rowan Building credit. "A party to a contract need not tender performance if the conduct of the other party acts as a waiver or amounts to a refusal to perform in any event, or an abandonment of the contract." *United California Bank v. Maltzman*, 44 Cal.App.3d 41, 52, 118 Cal.Rptr. 299 (1974).

Under these circumstances, where no evidentiary hearing ever was held on the matter, it would be improper to revisit Aslan's entitlement to a $2,000,000 reduction of the Judgment, without also affording the Banks a hearing on whether a result favorable to Aslan, on that question, vitiates Aslan's right to the Rowan Building credit. A result which, on the circumstances of this record, gave Aslan *both* the $2,000,000 reduction *and* the $3.1 million credit would be such a departure "from the accepted and usual course of judicial proceedings" that this Court's intervention would be required. [S.Ct. R. 10.1(a).]

CONCLUSION

The Banks submit that Aslan's Petition must be denied (and, with it, this Cross-Petition [S.Ct.R. 13.5]). However, if Aslan's Petition is granted, *and* Aslan prevails on his "penalty" argument or the "penalty" question is remanded to the Bankruptcy Court, then due process of law and complete justice between the parties require that the entire case, including the parties' rights with regard to the Rowan Building credit, be remanded.

For the reasons set forth herein, the Banks respectfully request that Aslan's Petition be denied; but that if Aslan's Petition is granted, this Cross-Petition also be granted so that the entire case may be remanded for any appropriate proceedings in the Bankruptcy Court.

Respectfully submitted,

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